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**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Part 208**

**RIN 1615-AC57**

**Docket No: USCIS 2020-0013**

**DEPARTMENT OF JUSTICE**

**Executive Office for Immigration Review**

**8 CFR Part 1208**

**A.G. Order No. 4975-2021**

**RIN 1125-AB08**

**Security Bars and Processing; Delay of Effective Date**

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security

(“DHS”); Executive Office for Immigration Review, Department of Justice (“DOJ”)

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** On December 23, 2020, DHS and DOJ (collectively, “the Departments”) published a final rule to clarify that the danger to the security of the United States statutory bar to eligibility for asylum and withholding of removal encompass certain emergency public health concerns and make certain other changes. The Departments are delaying the rule’s effective date for 60 days.

**DATES:** As of January 21, 2021, the effective date of the final rule published at 85 FR 84160 (Dec. 23, 2020) is delayed until [INSERT DATE 60 DAYS AFTER JANUARY 20, 2021].

**FOR FURTHER INFORMATION CONTACT:** For USCIS: Andrew Davidson, Asylum Division Chief, Refugee, Asylum and International Affairs Directorate, U.S. Citizenship and Immigration Services, DHS; telephone 240-721-3000 (not a toll-free call).

For EOIR: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, telephone (703) 305-0289 (not a toll-free call).

## **SUPPLEMENTARY INFORMATION:**

### **Background and Basis for Delay**

On December 23, 2020, the Departments published a final rule (“Security Bars rule”) to amend existing regulations to clarify that in certain circumstances there are “reasonable grounds for regarding [an] alien as a danger to the security of the United States” or “reasonable grounds to believe that [an] alien is a danger to the security of the United States” based on emergency public health concerns generated by a communicable disease, making the alien ineligible to be granted asylum in the United States under section 208 of the Immigration and Nationality Act or the protection of withholding of removal under that Act or subsequent regulations (because of the threat of torture). *See* Security Bars and Processing, 85 FR 84160 *et seq.* (Dec. 23, 2020).

On January 20, 2021, the White House Chief of Staff issued a memorandum asking agencies to consider delaying, consistent with applicable law, the effective dates of any rules that have published and not yet gone into effect, for the purpose of allowing the President’s appointees and designees to review questions of fact, law, and policy raised by those regulations. *See* Memorandum for the Heads of Executive Departments and Agencies from Ronald A. Klain, Assistant to the President and Chief of Staff, *Re: Regulatory Freeze Pending Review* (Jan. 20, 2021). This action is consistent with that memorandum.

The Departments have good cause to delay this rule’s effective date without advance notice and comment because a permissible path to implementation of the rule is not apparent due to a preliminary injunction against a related rule. On December 11, 2020, the Departments issued a rule titled *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*.<sup>1</sup> On January 8, 2021, a district court preliminarily enjoined the

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<sup>1</sup> *See* 85 FR 80274 (Dec. 11, 2020).

Departments “from implementing, enforcing, or applying the [December 11] rule . . . or any related policies or procedures.”<sup>2</sup>

Implementing the Security Bars rule will not be viable given this injunction. Most prominently, the Security Bars rule relies upon the framework for applying bars to asylum during credible fear processing that was established in the December 11 rule.<sup>3</sup> That is not possible given the injunction. The regulatory text of significant portions of the Security Bars rule is also embedded within and repeats regulatory text that was established by the December 11 rule.<sup>4</sup>

To implement the full Security Bars rule—and effectively reinsert or rely upon provisions that the *Pangea* court has enjoined—might run afoul of the court’s injunction. Because the court’s injunction is already effective and it would be impracticable to engage in notice and comment procedures in advance of the scheduled January 22 effective date, the Departments are proceeding with this final rule.<sup>5</sup>

The Acting Secretary of Homeland Security, David P. Pekoske, having reviewed and approved this document, has delegated the authority to electronically sign this document to Sharmistha Das, who is the Deputy General Counsel for DHS, for purposes of publication in the *Federal Register*.

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<sup>2</sup> See *Pangea Legal Servs. v. Dep’t of Homeland Security*, No. 20-09253-JD, 2021 WL 75756, at \*7 (N.D. Cal. Jan. 8, 2021). The *Pangea* court held that plaintiffs showed a likelihood that Chad F. Wolf, who approved the December 11 rule in his capacity as Acting Secretary of Homeland Security, did not have valid authority to act in that capacity. See *id.* \*6. Following the court’s ruling, Peter T. Gaynor and Mr. Wolf took steps to ratify the December 11 rule. See DHS Delegation No. 23028, Delegation to the Under Secretary for Strategy, Policy, and Plans to Act on Final Rules, Regulations, and Other Matters (Jan. 12, 2021); Chad F. Wolf, Ratification (Jan. 14, 2021). By issuing this rule, the Departments state no position on Mr. Gaynor or Mr. Wolf’s actions or authority, the outcome thus far in *Pangea*, or the effects of any further actions.

<sup>3</sup> See, e.g., 85 FR at 84176 (“As noted, the [Security Bars] final rule is not, as the NPRM proposed, modifying the regulatory framework to apply the danger to the security of the United States bars at the credible fear stage because, in the interim between the NPRM and the final rule, the [December 11 rule] did so for all of the bars to eligibility for asylum and withholding of removal.”); *id.* at 84189 (describing changes made in the Security Bars rule “to certain regulatory provisions not addressed in the proposed rule as necessitated by the intervening promulgation of the [December 11] Rule.”).

<sup>4</sup> Compare, e.g., 85 FR at 84194–84198 (revising 8 CFR 208.30, 235.6, 1208.30, and 1235.6, among other provisions) and 85 FR at 80390–80401 (same).

<sup>5</sup> See 5 U.S.C. 553(b)(B), (d) (providing an exception from the notice and comment requirements when an agency “for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest,” and providing additional exceptions with respect to the delayed effective date).

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